No. 11,536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

IRENE ZEHNLE and JERRY ZEHNLE, a Minor, by his Guardian Ad Litem, Irene Zehnle.

JERRY ZEHNLE, a Minor, by his Guardian Ad Litem, Irene Zehnle,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

FOREWORD.

On March 29, 1946, a jury returned a verdict in favor of appellee and against appellant in the sum of Twenty Thousand ($20,000.00) Dollars. (R. 19.) Judgment thereon was duly filed April 1, 1946. (R. 20, 21.)

Thereafter on May 17, 1946, an order was entered by the trial Court granting appellant's motion for a new trial. (R. 24 to 37.)

Subsequently, on June 11, 1946, the trial Court upon its own initiative entered its order vacating the order granting a new trial and restored appellant's motion for a new trial to the calendar for further hearing. (R. 37.)

On December 13, 1946, the trial Court entered an order denying appellant's motion for a new trial. (R. 38.)

The cause of action arose out of the death of appellee's father, Joseph John Zehnle, who, while riding as a fare-paying passenger on appellant's railroad on December 31, 1944, was killed when the railroad car in which he was riding was derailed and overturned. The cause went to trial on the first amended complaint of appellee, wherein he was the sole plaintiff (R. 5), and appellant's answer thereto. (R. 7.)

Appellee, at the time of his father's death, was two years, five months and fourteen days old. Appellee was born on July 18, 1942. (R. 56.)

II.

STATEMENT OF FACTS.

On this appeal, appellant admits negligence and does not seek a reversal of the judgment upon that issue. (App. Br. 5.)

Specifications of error are limited to excessive damages (set forth in two alternative specifications) and errors in law occurring at the trial in respect to

rulings by the trial Court sustaining objections to questions propounded by appellant relating to her verification of the original complaint wherein she was a party plaintiff. (App. Br. 9, 10.)

This latter specification is not argued in appellant's brief, consequently may be deemed to have been waived and no further reference thereto will be made in appellee's brief.

Appellee's factual statement will therefore be confined to evidence pertaining to the pecuniary loss suffered by him through the death of his father.

The decedent, Joseph John Zehnle, was born March 2, 1914 (R. 57), and at the time of his death was thirty years and ten months old.

He married Irene Zehnle September 3, 1941 (R. 56) in the State of Minnesota. (R. 58.) To this union the child Jerry Zehnle was born on July 18, 1942. (R. 56.) In November 1941, two months after her marriage, Mrs. Zehnle had returned to California (R. 60), where Jerry was born. (R. 61.)

When Jerry was a year old, his mother took him to Minnesota (R. 71), where the father, mother and child lived together for eight months. (R. 61, 71.)

Mr. Zehnle entered the Merchant Marine Service in April, 1944 (R. 59), and about that time, or shortly before, Mrs. Zehnle and Jerry returned to California.

Mrs. Zehnle, feeling that the amounts of money sent her by Mr. Zehnle were inadequate for the support of her and the child (R. 75, 76), on November

27, 1944, secured a decree of divorce in Reno, Nevada (R. 56), upon the grounds of failure to provide. (R. 44.)

This decree (R. 43, 44) was entered upon default of Joseph John Zehnle and awarded the custody of the minor child, Jerry Zehnle, to Mrs. Zehnle. No provision was made therein for child support.

In civilian life, prior to his marriage, Mr. Zehnle had followed the occupation of electrical engineer, earning around $300.00 per month. (R. 58.) During their married life, up to the time Mr. Zehnle entered the Merchant Marine, he worked on his father's ranch in Minnesota (R. 71), in which he had invested $1,-300.00 at the time of his marriage (R. 58), and he was putting into the farm every dollar he could. (R. 64). He was buying out his mother and dad. (R. 65.)

The only available record of Mr. Zehnle's earnings in the Merchant Marine is Plaintiff's Exhibit No. 3—a withholding receipt issued by the United States Lines showing earnings of $994.81 for the period July 31, 1944, to December 12, 1944. (R. 60.)

Appellant in his brief (p. 6) refers to these earnings as covering eight months of the year 1944—an average of $124.35 per month. Manifestly, this is incorrect, as the letters from Mr. Zehnle's employer, the United States Lines (Plaintiff's Exhibit No. 3), states the earnings covered the period July 31, 1944, to December 12, 1944 (R. 60), a period of about four and one-half months, or an average of approximately $221.00 per month.

During their married life, when Mrs. Zehnle and Jerry were living in California, and Mr. Zehnle was in Minnesota or in the Merchant Marine, he sent Mrs. Zehnle from twenty to fifty dollars a month. (R. 61, 62.)

Mr. Zehnle's attitude in respect to his son was kindly and affectionate. (R. 57.) He had discussed with Mrs. Zehnle for the upbringing of the youngster (R. 57), and he was buying the farm for the three of them. (R. 58, 65, 66.) At the time of his death, he was enroute to Sacramento to see Jerry and Mrs. Zehnle. (R. 63.)

III.

ARGUMENT.

Appellant argues two propositions in respect to the amount of damages awarded. They are:

> No proof that plaintiff suffered a pecuniary loss by or through the death of his father. (App. Br. p. 10);
>
> Verdict of $20,000 excessive. (App. Br. p. 28.)

In effect, both propositions might be placed in the one general category, namely, excessive damages, the question on which is to be approached under the settled rule that

> "A verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice

and raises a presumption that it is based on passion and prejudice rather than sober judgment."

Hughes v. Hearst Publications Inc. 79 A.C.A. 843, 846;

Roedder v. Lindsley, 28 Cal. (2d) 820, 823.

Appellant argues that there was no proof that the plaintiff suffered a pecuniary loss by the death of his father in that (a) no proof was made of loss of care, society, comfort, and protection, and (b) no proof was made of loss of support.

We submit that there is evidence to support the verdict.

An appellate court may not weigh evidence as a jury might in reaching a verdict.

Grossetti v. Sweasey, 176 Cal. 793.

A verdict, if supported at all by evidence setting out a reasonably credible story, is conclusive on appeal.

Bank of Orland v. Harlan, 188 Cal. 413.

At page 7 of appellant's brief, it is argued that decedent during a period of eight months contributed only $100.00 to the support of his family. This statement is based upon the contents of certain letters introduced in evidence, one of which (Plaintiff's Exhibit No. 5) refers to the transmittal of $100.00 for Christmas purposes by decedent to Mrs. Zehnle. (R. 81.) Notwithstanding Mrs. Zehnle's testimony that decedent sent sums varying from twenty to fifty dollars per month regularly, it is argued that the letters show only a contribution of one hundred dollars.

The evidence speaks for itself and there was credible testimony of generous contributions made regularly.

Appellant seeks to place a great deal of stress upon the fact that Mrs. Zehnle established residence in Nevada and filed suit for divorce from the decedent alleging his failure and refusal to provide her with the necessaries of life. (App. Br. p. 7.)

This completely ignores the fact that appellee, Jerry Zehnle, was not a party to the Nevada action and his mother did not allege any failure to provide for the child, and even if she had, her statement in the divorce action would not be binding upon appellee in this action.

Appellant concedes at page 9 of his brief that there was evidence that the deceased father had been planning and was ambitious for the child's future and that decedent had the ordinary paternal attitude of a father for his child.

(a) LOSS OF CARE, SOCIETY, COMFORT AND PROTECTION.

In respect to care, society, comfort and protection, appellant argues that because the Nevada divorce decree awarded custody of appellee to Mrs. Zehnle, the child was not entitled to, nor could the father, had he lived, bestow any care, society, comfort or protection.

Damages in a wrongful death action are based on the valuation of the benefits which the heirs probably

would have received from the decedent had his life not been taken, and in a case of this character, the damages sustained are largely of a *prospective nature.* (Emphasis supplied.)

Valente v. Sierra, 158 Cal. 412, 419.

The child * * * is not to be deprived of its natural and legal right of protection and support by its father because of any family quarrel or any agreement between husband and wife. It is not a party to divorce proceedings. It is not barred as to its rights by any decree therein.

McAllen v. McAllen, 106 N.W. 100 (Minn. 1906).

We think that the legal family status of the decree was limited merely to custody and deprived the father of the right to share therein. * * * The father's paternal interest in his minor child was in no wise affected. * * * The divorce dissolved the legal family relation between the husband and wife, but under what legal or humane consideration could it be accorded the force of destroying the natural family tie between father and child.

Fosters Estate, 220 Pac. 734 (Nevada Supreme Court).

The jury was instructed that in determining the pecuniary loss, if any, suffered by plaintiff in being deprived of the society, comfort and protection of his father, they had the right to consider the effect of the separation of the parents by a divorce decree which awarded sole custody to the mother and the fact that plaintiff and his father were living apart and in different states.

They were further instructed that if they found that in all probability Jerry Zehnle would continue during his minority to live apart from his father (if the latter had lived) then nothing could be awarded to plaintiff for the loss of the society, comfort and protection of the deceased and the amount of their award, if any, must be solely attributable to the loss of the legally enforceable right of support, if any there be. (R. 98, 99.)

We have no way of knowing whether or not the jury made any segregation of damages in respect to loss of society, comfort and protection on the one hand and loss of support on the other hand, but we submit that there was ample evidence to support the probability that the deceased father would have continued to bestow upon his son society, comfort and protection, and certainly there is nothing in the record to indicate the contrary.

That he had a normal paternal interest in his son is manifest by the following excerpts of testimony of Mrs. Zehnle.

"Q. Now in respect to your son and Mr. Zehnle's son, what was the attitude generally of Mr. Zehnle toward Jerry Zehnle? I mean by that just tell the jury was he kindly and affectionate, or just what feeling he had or regard he had for the little boy?

A. Oh, he was very kind to him, loved him very much, took him on trips, hay rides and the barn to see the pigs and cows and things like that." (R. 57.)

* * * * * * *

"Q. Now, had he ever discussed with you any particular plans in respect to the upbringing of the youngster, the future of the youngster?

A. He did.

Q. And of what nature were they?

A. Well, he was—when we first married he put down $1300.00 on the farm; that was to buy over for Jerry—and for the three of us.

Q. This was the farm that was located back in Minnesota?

A. Yes.

Q. And on which his parents were residing, is that correct?

A. Yes." (R. 57, 58.)

* * * * * * *

"Q. Now in respect to Mr. Zehnle's earnings, had he ever discussed with you what disposition he was making of over and above what money he sent you for your support and Jerry's support?

A. He was putting everything into the farm except what he sent me.

Q. This was the farm in Minnesota upon which his folks were residing, is that correct?

A. Yes.

Q. Had he ever discussed with you Jerry's future?

A. Yes, he did.

Q. And what discussion did he have with you and what did he say in respect to whatever objectives he had in mind for Jerry?

Mr. Wulff. And when, please?

Mr. O'Hara. During any discussion you had with him.

A. Well, he was always planning on his future ahead for years——

Mr. Wulff. A little louder, please. I can't hear you.

A. He was planning on his future ahead for years for him, going to school and for the farm, for him to get it. He was buying his mother and dad out.

Mr. O'Hara. Q. At times when you were with him, you and Jerry were with him, he was, you testified, kindly and affectionate toward the child?

A. Yes, he was.

Q. Was ambitious for the child's future?

A. Yes.

Q. And during the time you were away from him and the time he was in the Merchant Marine he communicated with you regularly, did he?

A. He did.

Q. And did he ever express himself about the youngster?

A. Yes, he did.

Q. Were those expressions in the ordinary paternal attitude of a father toward a child?

A. Yes." (R. 64, 65, 66.)

In his letters to Mrs. Zehnle, the decedent was constantly referring to Jerry, viz.:

"Mr. O'Hara. Reading from Plaintiff's Exhibit No. 7 on the letterhead of U. S. Maritime Service Training Station, Sheepshead Bay, New York, July 5, 1944.

"Dear Irene and Jerry: Hope this finds you both well. We got back to New York yesterday. As soon

as I get a chance I will send you some money. I will also send you 25 dollars for Jerry. I want you to buy something for his birthday. Hope you can get him something nice. Tell him it is from his Daddy. I got your letter yesterday. The first mail in over a month. This ship has to go in for repairs. I may get home a few days. I won't have time to come to Sacramento. After my next trip I may try and ship out of Frisco. That won't be till fall. You can send a letter home to let me know if you get the money O.K. Well, I must close. There isn't much to write. Love, Joe." (R. 84, 85.)

* * * * * * *

"Mr. O'Hara. On the letterhead of Council Club, a Dormitory and Breakfast Canteen for Service Men, 2 East 76th St., New York 21, N. Y. (Plaintiff's Exhibit No. 8, postmarked July 28, 1944.)

"Dear Irene and Jerry: Well, here I am back in New York again. Think I will ship in a few days again. How are things around there? Did you get the money I sent? Hope to try and come out to California after my next trip. Have no idea how long I will be out. Thanks a million for the nice pictures you sent. You both look well. I am very proud of Jerry. You sure take good care of him. Well, there isn't much to write from here. I will write again when I leave. Love, Joe." (R. 86.)

* * * * * * *

"Mr. O'Hara. Reading now from Plaintiff's Exhibit No. 5, a letter dated New York, New York, October 10, 1944:

"Dearest Irene and Jerry: Well, I got paid today so thought I would send you some money for Xmas in case I don't get back in time. 50 is for you, Irene, and 50 is for Jerry. I want you to buy yourself something nice. Get Jerry something nice too. Tell him it is from his Daddy. I hope I can spend Xmas with you and Jerry. I sent 200 dollars home for my dad to keep for me until I get there. Right now Irene I have exactly four dollars in my pocket. I don't need any money on the ship. I'm afraid, if I kept much money I'd go out and get drunk. (That is the way I feel.) Well, honey, I must ring off. Be a good girl and take care of my little boy. Love, Joe." (R. 81, 82.)

* * * * * * *

In his next letter (Plaintiff's Exhibit No. 6, R. 82 and 83), a letter dated November 10, 1944, decedent indicated he had received the summons in the divorce case. His devotion to his child was in no way altered:

"Mr. O'Hara. Reading now from Plaintiff's Exhibit number 6, a letter captioned "New York, New York, November 10, 1944:

"Dearest Irene and Jerry: Well, here I am back in N.Y. again. We got in yesterday. I didn't get a chance to write sooner. We leave again Mon. or Tuesday the 14th or 15th. We should be back again about the 15th of December. I'm going to take my 30 days as soon as I get back. I'll let you know when I get back again. I'm going to go home for a few days then I'll come to see you and Jerry. I'll let you

know when I leave home. Don't spend any money on me for Xmas. Spend it on yourself and Jerry. By the way, I bought Jerry a 25 dollar bond last trip. In ten years from now he will want a bicycle or something. Then he will have his own money. I also have a few small things I picked up in France and England. I got my mail yesterday. Was happy to get your letter. I received the summons from your lawyer. I guess you forgot to tell him I'm a seaman. Well, honey, I must ring off. I'll sure be glad when the next trip is over. Tell Jerry his Daddy is coming home soon. Love, Joe." (R. 82, 83.)

* * * * * * *

A second letter subsequent to decedent's receipt of the summons again indicates his interest in and desire to see his child:

"Mr. O'Hara. Reading from Plaintiff's Exhibit number 4, it is a letter dated New York, N. Y., December 12, 1944:

"Dearest Irene: Well, here I am again. We just got in. Haven't been able to get off the ship yet. I think we will get passes this evening. I hope so. I want to mail this letter. I'm going to try and get off the ship tomorrow. I'll go home for a few days and then I'll come to see you and Jerry. Hope you's are both well. I'll let you know when I leave home. I have a lot of things to do tomorrow. I haven't got my mail yet. Well, honey, I'm in a hurry so must ring off. Will see you soon. Love, Joe." (R. 79.)

The foregoing conclusively demonstrates that, regardless of the mother's judgment, good or bad, in

getting a divorce, the father maintained a normal, healthy paternal interest in his child and the evidence is sufficient to show a reasonable probability that the society, comfort and protection to the surviving child was of such a character that it would be of a pecuniary advantage to the child, and that a deprivation thereof would entail a pecuniary loss to him.

Sanfilippo v. Lesser, 59 Cal. App. 86.

(b) LOSS OF SUPPORT.

Appellant argues there is no proof of loss of support and cites the Nevada divorce decree which made no provision requiring the deceased father (defendant therein) to pay any sum whatsoever for the support of his minor child.

In his presentation of this question, appellant ignores one important factor, namely, the lack of jurisdiction in the Nevada Court to award a money judgment against a non-resident defendant.

The decedent, who was the defendant in the divorce action, was a non-resident of the state of Nevada, was not personally served with summons within the state and did not appear in the action. Consequently, no money judgment could be obtained against him.

Shillock v. Shillock, 24 C.A. 191;

Comfort v. Comfort, 17 Cal. (2d) 736;

De La Montanya v. De La Montanya, 112 Cal. 101;

Merchants Natl. Union v. Buisseret, 15 C.A. 444.

The Supreme Court of Nevada in *Foster's Estate,* 220 Pac. 734, has expressed its rule that divorce and deprivation of custody in no wise affects or relieves the *natural* and *legal* obligation of a father to support his minor child. He is liable for the maintenance of his child notwithstanding the decree.

The Supreme Court of Utah in *Burbridge v. Utah Light and Traction Co.,* 196 Pac. 556 has stated that

> "a father being legally bound to support his minor children, and the law providing means by which they can compel him to support them, they are entitled to damages for his wrongful death, though he did not recognize his legal obligation to support them; and this obligation and their prospective inheritance are proper questions to be considered by the jury in fixing damages."

The Minnesota Courts in *McAllen v. McAllen,* 106 N.W. 100 have said

> "The obligation of progenitors to support their offspring rests upon an entirely different foundation from that upon which the law bases the duty of husband to care for his wife. That obligation is at once legal and natural. It springs as necessarily from law as from the primal instincts of human nature. Its consistent enforcement is equally essential to the well being of the state, the morals of the community, and the development of the individual. * * * The child * * * is not to be deprived of its natural and legal right of protection and support by its father because of any family quarrel or any agreement between husband and wife. It is not a party to divorce proceedings. It is not barred as to its rights by any decree therein."

The character and extent of father's obligation to support minor child, and status of minor are generally determined by law of father's domicile and not by place of child's residence.

Yarborough v. Yarborough, 290 U.S. 202.

The California Supreme Court has had no difficulty in establishing the rule that dependency of an heir in a death case, where divorce, separation and deprivation of custody have intervened may be established:

(1) By voluntary resumption on the part of the father of his parental relations and obligations to his child.

(2) By the legal liability for the support of his child imposed by the terms of the divorce decree.

(3) *By the basic legal obligation imposed by law upon a father to support his dependent child to the end that it shall not become a public charge.* (Emphasis supplied.)

Mutual L. Ins. Co. v. I.A.C., 195 Cal. 283.

> "Since the recasting of Section 270 of the Penal Code in 1923 * * *, the failure of a father to provide necessary support and maintenance for his minor child has been a criminal offense. This is true regardless of agreements, property settlement, decree of divorce or decrees respecting custody or maintenance of the minor, affecting the husband and wife. All doubt or confusion on this subject has also been settled by recent decisions of this court. (Citing Mutual L. Ins. Co. v. I.A.C., 195 Cal. 283; Sou. Cal. Edison Co. v. I.A.C., 92 C.A. 355)."

Dixon v. Dixon, 217 Cal. 440, 442.

Section 270 of the Penal Code of the State of California reads as follows:

"Omitting to provide child with necessaries: Evidence: Dead or incapacitated father: Operation of Section: A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars, or by both. This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child or because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so.

Evidence: Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

Dead or incapacitated father. In the event that the father of either a legitimate or illegitimate minor child is dead or unable by reason of physical or mental infirmity to furnish the necessary

food, clothing, shelter or medical attendance or other remedial care for his minor child, the mother of said child shall become subject to the provisions of this section and be criminally liable for the support of said minor child during the period of inability on the part of the father to the same extent and in the same manner as the father would have been had it not been for his physical or mental infirmity.

Operation of section. The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

In respect to support, Mrs. Zehnle testified as follows:

"Q. Now during the time you lived in Minnesota after the baby was born, Mr. Zehnle supported the youngster and yourself, is that correct?

A. Yes, he did.

Q. Upon your return to California with the baby--- you and the baby came together, is that correct?

A. Yes.

Q. Did Mr. Zehnle contribute to the youngster's support and your support?

A. Yes, he did.

Q. And he would send you money from time to time?

A. Yes.

Q. And in what amounts, average amounts, would they be?

A. Well, it was between twenty and fifty.

Q. Dollars?

A. Yes.

Q. What?

A. Between twenty and fifty dollars.

Q. A month, or what?

A. Yes, a month.

Q. And did that continue after he went into the Merchant Marine?

A. Yes.

Q. He would send you money from time to time?

A. Yes, he did.

Q. Maintaining about the same average, is that correct?

A. Yes." (R. 61, 62.)

* * * * * * *

"Q. Had he returned from a voyage around December 12, 1944?

A. Yes, he did.

Q. Did you hear from him around that time?

A. Yes, I did.

Q. And did you hear from him subsequent—or just prior to the time that he was enroute out here when this train wreck occurred?

A. Yes, I did.

Q. And he had sent money to you, had he?

A. Yes, he did.

Q. When was the last occasion that you had received money from him just prior to his death?

A. The last time I received money was when he was in New York. He sent $50 for a Christmas present and $50 for Jerry." (R. 62, 63.)

* * * * * * *

"Q. Now, Mrs. Zehnle, the money that Mr. Zehnle sent you from time to time, that average, as you stated, the amount per month, was that money used by you for the support of Jerry?

A. Yes, it was.

Q. And were you dependent upon that money to any extent?

A. Yes, I was.

Q. For the support of Jerry?

A. Yes." (R. 63.)

* * * * * * *

"Mr. O'Hara. Q. Now, Mrs. Zehnle, it is true that you did secure this decree of divorce on the ground of failure to provide. That is right, isn't it?

A. Yes.

Q. However, it is also true, is it not, that Mr. Zehnle did make some contribution toward your support and that of Jerry at all times, isn't that true?

Mr. Wulff. Just a moment.

A. He did.

(Objection and argument.)

A. He did.

Q. I take it then—is it a correct statement that your allegation and securing a divorce on the ground of failure to provide was not as a result of a complete failure to send anything but what you felt was inadequate, is that it?

A. Yes.

Q. In other words, you have testified on your direct examination that he sent you varying sums ranging from twenty to fifty dollars a month, is that right?

A. Yes.

Q. Was that sufficient?

A. No, it wasn't.

Q. ——for you to support yourself and your youngster on?

A. No.

Q. You had to supplement that with your own earnings?

A. Yes, I did." (R. 74, 75, 76.)

We believe the foregoing fully establishes that appellee was dependent upon his father for support and refutes appellant's argument that plaintiff failed to prove that his mother was unable to supply such maintenance. (App. Br. p. 24.)

The jury was fully instructed on this phase of damages and were told by the Court that the mother was primarily responsible for plaintiff's support, so long as the custody provision of the divorce decree remained in effect and that decedent was released from his obligation to support his son unless, had decedent lived:

(1) A court of competent jurisdiction would order decedent to pay certain sums for support, etc.

(2) The mother should abandon the child or become financially unable to support him the son then by legal proceeding could compel his father to support him.

(3) The plaintiff became poor and indigent without any means of support so that he would become a public charge, then his father would be obligated for his support.

(4) The father could have voluntarily resumed his parental relations and obligations by giving his son money for support, etc.

The instruction further told the jury to consider the probability, or lack of probability, of the happening of any of the aforementioned contingencies in order to determine the amount of money, if any, it could be reasonably expected that decedent would have paid for plaintiff's support, had the former lived. (R. 97, 98.)

This instruction was far more favorable to appellant than the settled law of the State of California, for it completely ignored that factor laid down by the California Supreme Court in *Mutual L. Ins. Co. v. I.A.C.,* 195 Cal. 283, namely, that dependency is established by the basic legal obligation imposed by law upon a father to support his dependent child.

Appellant at page 8 of its brief states there was no evidence in the record after the death of Zehnle the mother was unable to support her child, but that on the contrary, the mother testified that she was able to support herself and child by working and from the insurance money she was receiving.

The following excerpts of testimony should conclusively show the fallacy of appellant's statement for the reason that the insurance payments were to be

over a temporary period only expiring at the end of the year, 1947.

"Q. Now, subsequent to Mr. Zehnle's death, what has been the principal means of your support?

A. Well, between working, and then the insurance that I had from his death.

Q. You received some insurance money?

A. Yes sir, I did.

Q. Life insurance money?

A. Yes.

Q. And was that paid to you in a lump sum, or is that being paid to you over a period of months or years.

A. A period through months.

Q. And under the policy you receive so much per month, is that correct?

A. Yes.

Q. Will you state to the jury just what the amounts are that you received, that is, the various amounts during the period that the policy runs?

A. I receive a hundred dollars a month for the first year, and the second year seventy-five and the third, fifty dollars a month.

Q. So that during the year 1945 you have received $100 a month from the proceeds of this policy, and the second year, 1946, you are receiving $75 a month, and in 1947 you receive $50 a month.

A. Yes.

Q. And then that will be the termination of the proceeds of the policy at the end of 1947, is that correct?

A. Yes." (R. 63, 64.)

(c) VERDICT OF $20,000.00 NOT EXCESSIVE.

Appellant argues that the only basis for the jury award was loss of support. Presumably, he means that loss based upon society, comfort and protection could not be considered.

As hereinabove pointed out, the jury was instructed the effect of the separation and divorce of the parents and to weigh the probability of whether or not, under such circumstances the father would have continued to bestow society, comfort and protection to his minor son.

It is presumed that the jury intelligently followed the instruction and did weigh the probability.

Certainly the separation occasioned by the father's service in the Merchant Marine cannot be consistently considered. His letters continually express devotion to and interest in his son and if service to one's country in time of war is a debit against society and protection then millions of families in this country lived in a state of separation and the family suffered deprivation of society and protection of the father during the war years and a tort-feasor could with complete impudence claim a credit against any damages assessed against him.

There was sufficient evidence to warrant the jury finding that appellee and decedent would have held a close contact, had not death intervened. Mrs. Zehnle's testimony established decedent's affection toward the boy, the father's interest in his future and his plans for raising the child and for the

acquisition of the farm decedent was buying from his mother and father.

At the time of his death decedent was enroute to Sacramento to see his boy.

This should dispose of appellant's argument as to the excessiveness of the verdict, however, he presents an arithmetical problem based upon the commuted value of an annuity which has nothing to do with the case for two reasons.

The first, there was evidence of loss of society and protection upon which the jury was instructed, and in arriving at pecuniary loss in a death case the standard for measurement of damages is composed of two elements; namely, loss of comfort, society and protection as one, and loss of support as the other. *Peters v. S. P. Co.,* 160 Cal. 48. Pecuniary loss is not dependent upon any "legal liability." *Michigan Cent. R. Co. v. Vreeland,* 227 U.S. 59, 57 L. Ed. 417. It is sufficient if the evidence shows a consistent purpose to contribute. *The City of Rome,* 48 F. (2d) 333, 338.

The second reason is that the legislature of the State of California has not declared the money value of a life annuity to be the measure of damages in an action for death, but has determined to leave the subject of damages at large, to be determined by the jury, with the single restriction that the damages allowed should be just, under all the circumstances of the case. *Redfield v. Oakland C.S. Ry. Co.,* 110 Cal. 277.

Apropos of appellant's comment at page 30 of his brief quoting a portion of the trial judge's opinion

wherein he refers to the interest manifested in the minor plaintiff by the jurors, it is sufficient to say that the trial judge withdrew this opinion in its entirety. (R. 37.)

The record indicates that nothing occurred during the trial to excite the passion and prejudice of the jurors. *Cole v. Chicago St. P.M. & O. Ry. Co.,* 59 Fed. Supp. 443. (D. C. Minn.)

When attacked upon the ground of excessive damages, a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment. *Hughes v. Hearst Publications Inc.,* 79 A.C.A. 843, 846; *Roedder v. Lindsley,* 28 Cal. (2d) 820, 823.

CONCLUSION.

For the foregoing reasons it is respectfully urged that the judgment should be affirmed.

Dated, Sacramento, California,
July 25, 1947.

Respectfully submitted,
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